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June 12, 2009

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D. C. 20554

Re: Petition to Establish Procedural Requirements to Govern Proceedings
for Forbearance Under Section 10 of the Communications Act of 1934,
As Amended, WC Docket No. 07-267

Dear Ms. Dortch:

Press reports indicate that the Commission is currently considering issuing an order in the above-referenced proceeding.¹ Among the proposals under consideration in this docket is a request by the petitioning CLECs to have the Commission impose a "burden of proof" on a party that petitions for forbearance under Section 10 of the Act.² As explained below and in AT&T's previously filed comments,³ any such rule would be contrary to the Act and therefore unlawful.

Section 10(a) mandates that the Commission "shall forbear" from applying any regulation or provision of the Act to a telecommunications carrier if three conditions enumerated in the Act are met: (i) the regulation or provision is not necessary to ensure that rates are just and reasonable and not unduly discriminatory, (ii) the regulation or provision is not necessary to protect consumers, and (iii) forbearance is in the public interest.⁴ Thus, the statute requires that the Commission forbear if the statutory criteria are satisfied, *regardless* of whether any party files a petition seeking forbearance. Given that no forbearance petition at all is required by law, the Commission cannot impose the burden of proof on a petitioning party.

Further, Section 10 requires that the Commission *shall forbear* from enforcing a regulation or provision of the Act if the three-part test set forth in Section 10(a) is met. The Commission cannot avoid that mandate by establishing a burden of proof requirement that artificially and unnecessarily limit the evidence to be considered in a forbearance proceeding. Indeed, such a requirement would effectively "deputize" a petitioner as the representative of all of those who might support or benefit from a forbearance request. An example illustrates this point. Assume that a carrier files a

¹ See Communications Daily, Wireline (June 2, 2009).

² 47 U.S.C.A. § 160.

³ AT&T Comments, WC Docket No. 07-267, at 7-9 (March 7, 2008).

⁴ 47 U.S.C.A. § 160(a).

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petition asserting that the Commission should forbear from a particular regulation that applies to a class of carriers, and, during the proceeding to evaluate the petition, other carriers in that class supply probative evidence demonstrating that the statutory criteria are satisfied, but this evidence was not included in the carrier's petition. Section 10 would not permit the Commission to deny forbearance because the petitioning carrier purportedly did not meet its "burden of proof" when it failed to include the probative evidence in its petition. Rather, Section 10 would require the Commission to grant forbearance in this situation, regardless of whether the probative evidence came from the petitioner, other parties, or from the Commission itself. If the record demonstrates that the statutory criteria are satisfied, there is but only one outcome: the Commission "shall forbear" from the regulation in question. Beyond that, it has been FCC practice to seek public comment on forbearance petitions in order to compile as complete a record as possible. Placing the burden of proof entirely on the petitioner, without considering any additional supporting arguments or facts offered by other parties, would be inconsistent with that practice.

Finally, imposing a "burden of proof" on a petitioning carrier is not necessary in any event. Any petitioning party and any other parties adversely affected by unnecessary regulation have every incentive to bring to the Commission's attention all evidence demonstrating that the regulation has outlived its usefulness. The failure to do so will simply lessen the likelihood that the Commission will find that the statutory requirements for forbearance have been met. Thus, proposals to impose a "burden of proof" on petitioners are not only unlawful, but unnecessary as well.

Pursuant to section 1.1206 of the Commission's Rules, this letter is being filed electronically with the Commission. Please place a copy of this letter in the record of above-referenced proceeding.

Sincerely,

/s/ Robert W. Quinn, Jr.

cc: S. Deutchman
J. Schneider
M. Stone
N. Alexander
J. Veach